



FELDESMAN
TUCKER
LEIFER
FIDELL LLP

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VIA ELECTRONIC MAIL

Committee for Purchase From People
Who Are Blind or Severely Disabled
1421 Jefferson Davis Highway
Jefferson Plaza 2, Suite 10800
Arlington VA 22202-3259

RE: Request for Public Comment on the Proposed Rule Requiring Governance Standards for Non-Profit Agencies Awarded Government Contracts under the JWOD Act -- 69 Fed. Reg. 65395 et seq. (November 12, 2004)

Dear Sir:

As a law firm that represents non-profit organizations receiving Federal contracts and grants, Feldesman Tucker Leifer Fidell LLP ("Firm") is responding as an interested party to the above-referenced request for comments regarding the proposed imposition of governance standards for non-profit agencies awarded government contracts (or seeking to qualify for such award) under the JWOD Act. In particular, the Firm wishes to comment on the provision in the proposed standards that would establish specific benchmarks for classifying executive and other employee compensation as "reasonable."

COMMENT

The proposed regulations would allow the Committee to independently review the reasonableness of executive compensation for particular JWOD participating nonprofit agencies. As it is the duty of all nonprofits to ensure that executive compensation is not "excessive," there is nothing particularly offensive about the proposed compensation standard in and of itself. However, because the proposed regulation sets criteria for wage reasonableness that are different

from – and, in some respects, inconsistent with – existing standards, the proposed rule exceeds the Committee’s legal authority.

The Federal Acquisition Regulation (FAR) sets the ceiling on compensation that a nonprofit contractor may charge to a Federal contract by reference to OMB Circular A-122 (“Cost Principles for Non-Profit Organizations”), which in turn provides that compensation for personal services “will be considered reasonable to the extent that it is consistent with that paid for similar work in the organization's other activities” and/or if “it is comparable to that paid for similar work in the labor markets in which the organization competes for the kind of employees involved.” *See* 48 C.F.R. § 31.702; OMB Circular A-122, Att. B, ¶ 8(c).

Section 31.703(b) of the FAR contemplates that agencies, such as the Committee, shall not place additional reasonableness or allowability restrictions on individual items of cost. 48 C.F.R. § 31.703(b). Similarly, the OMB “common rule” for grants, cooperative agreements, and contracts with nonprofit entities prohibits individual Federal agencies from deviating from the OMB’s uniform cost principles and administrative requirements without OMB approval. 2 C.F.R. § 215.4.

However, the proposed rule would effect precisely such additional restrictions. The proposed rule provides, in relevant part, that:

In assessing the reasonableness of executive and other employee compensation, the Committee will consider:

- (1) The size and complexity of the central nonprofit agency's or nonprofit agency's charter or mission;
- (2) The mission area, geographic size, and financial condition of the central nonprofit agency or nonprofit agency;
- (3) The technical and professional qualifications required for positions in the central nonprofit agency or nonprofit agency;
- (4) Compensation packages paid at comparable central nonprofit agencies or nonprofit agencies;
- (5) The percentage of the net revenues to the central nonprofit agency or nonprofit agency realized from the JWOD Program paid to employees and to senior management;
- (6) The extent to which the central nonprofit agency's or nonprofit agency's executive compensation packages exceed the total compensation offered to the typical, highest paid (excluding any retention allowances and Presidential rank awards), senior executive service, career Federal government employee; and

- (7) For only nonprofit agencies, the median compensation package for the nonprofit agency's direct labor hour workers and how that median compares to the compensation packages offered to executives.

These factors go far beyond the wage reasonableness criteria in OMB Circular A-122. There is nothing in the relevant cost principles that would require comparisons of executive and employee pay, or of compensation and net revenues, in assessing whether a personal service cost is "reasonable" and "allowable." Further, there is no apparent reasoned basis for tying the wage reasonableness determination for JWOD contractors to Federal executive compensation. The Committee has offered nothing to suggest that SES compensation bears any relationship to relevant labor market wage rates. Rather, the Committee's sole justification for its reliance on Federal compensation as a benchmark is that that "the JWOD Program is a Federal program and the funds obtained through the JWOD Program are Federal contract funds." This rationale is unavailing, as the Congress has already determined that the proper benchmark for executive compensation for Federal contractors is the median amount of compensation for executives in "publicly-owned United States corporation[s] that [have] annual sales in excess of \$50,000,000 for the fiscal year." 41 U.S.C. § 435.

In light of the foregoing, the proposed rule as published in the Federal Register exceeds the Committee's authority. Thank you for the opportunity to provide comment.